Supreme Court, U.S.
FILED

02 898 SEP 10 2002

No.

In the

Supreme Court of the United States

TOM FIESEL,

Petitioner,

v.

DESSIE F. CHERRY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Trang Q. Tran
Counsel of Record
Tran Law Firm L.L.P
440 Louisiana Ste. 590
Houston, Texas 77002
(713) 223-8855
Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

APP

QUESTION PRESENTED

1. Does a potential private motive remove speech from the context of "a matter of public concern" for purposes of a First Amendment/Retaliation claim?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of the Petition, the parties are:

Petitioner: TOM FIESEL (Mr. Fiesel), an individual.

Respondent: DESSIE F. CHERRY, individually and in her official capacity as Senior Warden I, Texas Department of Criminal Justice; LEPHER JENKINS, individually and in his official capacity as Regional/Section Director, Texas Department of Criminal Justice; JAMES E. BUSH, in his official capacity as Director, Human Resources and Staff Development, Texas Department of Criminal Justice; CYNTHIA N. MILNE, in her official capacity as Legal Affairs, Texas Department of Criminal Justice; JANIE COCKRELL, in her official capacity as Deputy Director, Texas Department of Criminal Justice; GARY L. JOHNSON, Director; JAMES WILLET, individually and in his official capacity as Senior Warden, Texas Department of Criminal Justice.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 18

APPENDIX

CIRCUIT COURT OPINION (6/12/02) 1a

DISTRICT COURT ORDER (12/1/00) 8a

DISTRICT COURT ORDER (1/11/01) 19a

TABLE OF AUTHORITIES

CASES

ADICKES V. S.H. KRESS & COMPANY, 398 U.S. 144, 156-157 (1970) 15, 16

ANDERSON V. LIBERTY LOBBY, INC., 477 U.S. 242, 247 (1986) 15, 16

BALDASSARE V. STATE OF N.J., 250 F.3D 188 (3RD CIR. 2001) 8, 11, 17

BURLINGTON INDUS., INC. V. ELLERTH, 524 U.S. 742, 743 (1998) 17

CELOTEX CORP. V. CATRETT, 477 U.S. 317, 322 (1986) 15, 16

CHESSER V. SPARKS, 248 F.3D 1117 (11TH CIR. 2001) 8, 11

CONNICK V. MYERS, 461 U.S. 138, 147-148 (1983) 9, 13

CRAVEN V. UNIVERSITY OF COLORADO HOSP. AUTHORITY, 260 F.3D 1218 AT 1226 (10TH 2001) 16

CRAWFORD-EL V. BRITTON, 523 U.S. ___ 16

DELLANO V. BERGLUND, 282 F.3D 1031 (8TH CIR. 2002) 8, 12

ENTERTAINMENT RESEARCH GROUP, INC. V. GENESIS CREATIVE GROUP, INC., 122 F.3D 1211, 1217 (9TH CIR.1997) 16

FARMER V. CLEVELAND PUBLIC POWER, 295 F.3D 593 (6TH CIR. 2002) 8, 12

FRAZIER V. KING, 873 F.2D 820 (5TH CIR. 1989) 13

GREER V. AMESQUE, 212 F.3D 358 (7TH CIR. 2000) 11

HARLOW V. FITZGERALD, 457 U.S. 800, 816-17 (1982) 15

HARRIS V. VICTORIA INDEP. SCH. DIST., 168 F.3D 216, 220 (5TH CIR. 1999) 14

HENSLEY V. HORNE, 297 F.3D 344 (4TH CIR. 2002) 8, 11, 16

KNAPP V. WHITAKER, 757 F.2D 827, 840 (7TH CIR.1985) 11, 16

LICKISS V. DREXLER, 141 F.3D 1220, 1222 (7TH CIR.1998) 11

MARSHALL V. PORTER COUNTY PLAN COMM'N, 32 F.3D 1215, 1219 (7TH CIR. 1994) 11

MCKINLEY V. CITY OF ELOY, 705 F.2D 1110, 1114 (9TH CIR.1983) 12

MT. HEALTHY CITY SCH. DIST. BD. OF EDUC. V. DOYLE, 429 U.S. 274, 287 (1977) 14

MULLIN V. TOWN OF FAIRHAVEN, 284 F.3D 31 (1ST CIR. 2002) 8, 10

MURRAY V. GARDNER, 741 F2D 434 AT 439 (D.C. CIR. 1984) 8, 12

O'CONNER V. STEEVES, 994 F.2D 905, (1ST CIR. 1993) 9, 13

PAPAS V. GIULIANI, 290 F.3D 143 (2ND CIR. 2002) 8, 10

PICKERING V. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT, 391 U.S. 563, 88 S.CT. 1731, 20 L.ED.2D 811 (1968) 8, 13

PIVER V. PENDER BOARD OF EDUCATION, 835 F.2D 1076, 1078 (4TH CIR. 1987) 13

POOL V. VANRHEEN, 297 F.3D 899 (9TH CIR. 2002) 8, 9, 13

RANKIN V. MCPHERSON, 483 U.S. 378, 385-386 ..... 14, 15

ROSENBLATT V. BAER, 383 U.S. 75, 80 (1966) 14

SCHWARZER, SUMMARY JUDGMENT MOTIONS, 139 F.R.D. 441, 455-456, 487 (1992) 14

ST. MARY'S HONOR CENTER V. HICKS, 113 S.CT. 2742, 2749 (1993) 14

UNITED STATES V. DUNKEL, 927 F.2D 955, 956 (7TH CIR.1991) (PER CURIAM) 16

VILLAGE OF ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DISTRICT, 429 U.S. 252, 264-65 (1977) 14

WALTER V. MORTON, 33 F.3D 1240, 1243 (10TH CIR.1994) 8, 11, 17

WASHINGTON V. DAVIS, 426 U.S. 229 (1976) 14

WRIGHT V. ILLINOIS DEP'T OF CHILDREN & FAM. SERVS., 40 F.3D 1492, 1499-1500 (7TH CIR. 1994) 8

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. §§ 1331 2

42 U.S.C. § 1983 ..... 2, 3, 7

IN THE
SUPREME COURT OF THE UNITED STATES

TOM FIESEL

Petitioner,

V.

DESSIE CHERRY

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TOM FIESEL, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioner, Tom Fiesel ("Mr. Fiesel"), a public employee, alleges that Defendants James Willet, Warden Dessie F. Cherry, Lepher Jenkins and the Texas Department of Criminal Justice (Collectively "Defendants"), violated his constitutionally guarded First Amendment Rights by terminating his employment in retaliation for his statements on a matter of public concern.

Defendants brought a Motion for Summary Judgment, arguing that there was no genuine issue of material fact in dispute as to whether their conduct violated Mr. Fiesel's civil rights.

On November 2, 2000, Magistrate Calvin Botley denied defendant's motion for summary judgment. Magistrate Botley found that by viewing the facts presented in the light

most favorable to Mr. Fiesel, as prescribed by the appropriate summary judgment analysis, Mr. Fiesel has adequately alleged a violation of a clearly established, constitutionally protected right, and raised fact issues as to whether Defendants' acted in an objective reasonable manner in light of the Petitioner's civil rights. Magistrate Botley denied defendants' request for summary judgment as to qualified immunity.

On November 17, 2000, Defendants filed their objection to Magistrate Botley's November 2, 2000 memorandum and recommendation. In response, Mr. Fiesel filed his supplemental responses to Defendants' objections to the Magistrate's recommendation on November 29, 2000.

In a December 1, 2000 memorandum and order, the District Court granted Defendants' motion for summary judgment and dismissed all of Mr. Fiesel's claims. Mr. Fiesel subsequently filed a Rule 59 motion to identify errors in the District Court's memorandum and order. On January 11, 2001, the District Court denied Mr. Fiesel's Rule 59 motion and signed a final order dismissing Mr. Fiesel's suit.

Mr. Fiesel timely appealed to the United Stated Court of Appeals for the Fifth Circuit on May 29, 2001. On June 12, 2002, the Fifth Circuit affirmed the District Court's decision granting Defendants' motion for summary judgment.

JURISDICTION

Original jurisdiction in the U.S. District Court for the Southern District of Texas was based upon 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. Petitioner prosecuted a timely appeal to the Fifth Circuit Court of Appeals under the authority of 28 U.S.C. § 1291. This Court has jurisdiction to review the decision of the Fifth Circuit Court of Appeals under 28 U.S.C. § 1254(1). The judgment of the Fifth Circuit Court of Appeals was entered on June 12, 2002.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTES INVOLVED

42 United States Code 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Federal Rule Of Civil Procedure 56 (c)

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A. General Background and Description

The sequence of events that lead to Mr. Fiesel's wrongful termination stem from an investigation regarding his fellow co-worker/officer, Michael Bloodworth ("Mr. Bloodworth"). Warden Dessie Cherry and Major McGee decided to question Mr. Bloodworth about his relationship to an incident involving an inmate who was caught in

possession with marijuana. Officer Bloodworth had been implicated by the inmate as the source of the marijuana. Warden Cherry informed Mr. Bloodworth in the early morning of January 7, 1998 that she and Major McGee wanted to see him that morning in her office.

Mr. Bloodworth was informed of the meeting with the warden and told he was allowed to bring someone for moral support. Mr. Bloodworth turned to Mr. Fiesel, a fellow correctional officer of 8 years with the Texas Department of Criminal Justice, to accompany him to the meeting. Warden Cherry has previously been involved in administrative investigations of employees that lead to them being arrested, which concerned Mr. Bloodworth. Mr. Fiesel agreed to accompany Mr. Bloodworth as a silent civilian observer to the meeting when their shift ended. When their shift ended at 6:00 a.m., Mr. Fiesel went home to change out of his uniform into his civilian clothes.

B. The Meeting of January 7, 1998 That Led To Mr. Fiesel's Wrongful

Termination

Warden Cherry and Major McGee questioned Mr. Bloodworth about his role in the incident involving the inmate. At the conclusion of the meeting, Major McGee stated that he did not believe Mr. Bloodworth' s explanation and Warden Cherry agreed. At that point, Mr. Bloodworth was instructed that he would need to speak to officers from the Internal Affairs Department ("IAD") and told to wait until the investigators arrived. As a matter of practice, if these officers discover that a correctional officer has committed the crime of smuggling drugs into the prison system, they will take that employee into custody, bring them to the county jail and have that employee booked.

Warden Cherry allowed Mr. Fiesel and Mr. Bloodworth to take a ten to fifteen minute break and instructed them that once the officers had arrived on the unit and were prepared, they would come out and summon him. During the break, Mr. Fiesel counseled Mr. Bloodworth and

told him of his belief that the IAD officers were "policemen" and would interrogate Mr. Bloodworth into confessing and press criminal charges against him. Mr. Fiesel advised Mr. Bloodworth to obtain legal counsel immediately before talking to the investigators. Mr. Bloodworth agreed.

Mr. Bloodworth entered the secretary's office first while Mr. Fiesel stood outside in the hallway. Mr. Fiesel heard Mr. Bloodworth state that he did not want to stay and wanted to obtain a lawyer. An IAD officer responded by instructing Mr. Bloodworth to stay and failed to acknowledge the request for an attorney. At this time, Mr. Fiesel stepped into the secretary's office and participated in the discussion. Mr. Fiesel publicly objected to their lack of acknowledgement of Mr. Bloodworth's request for counsel. In his objection, Mr. Fiesel stated that TDCJ employees in similar positions have the same rights as all United States citizens and are entitled to an attorney before being questioned by the police.

Five people were present in the room and three people were speaking at once, some speaking with raised voices. Mr. Fiesel has significant hearing loss from his service in the military that impairs his ability to hear certain noises in loud surroundings. Mr. Fiesel never heard Warden Cherry give any command during the three to five minute discussion in the Warden's secretary's office. Mr. Fiesel was told by one of the officers that he was trespassing and needed to leave. At the end of the conversation, Mr. Fiesel voluntarily left the secretary's office and walked out of the Unit. At no point did Mr. Fiesel ever become physically violent or threatening. Mr. Fiesel never instructed Mr. Bloodworth to lie to the officers in any way. Mr. Fiesel never placed his arm on Mr. Bloodworth or restrained him from entering Warden Cherry's office for the interview.

That same morning, Warden Cherry made a recommendation to terminate Mr. Fiesel

C. TDCJ's Investigation Into Mr. Fiesel's Termination

Warden Cherry was disqualified from participating in the actual investigation and discipline of Mr. Fiesel since he was directly involved. As a result, Warden Willet, was called in to investigate and discipline Mr. Fiesel.

However, it is notable that Warden Willet never investigated the incident himself and in fact, he admitted this. Instead, he relied solely on the investigative work product and recommendation of Warden Cherry.

Warden Willet met with Mr. Fiesel and his legal counsel. Through his legal counsel, Mr. Fiesel explained to Warden Willet why he spoke up and explained that he was speaking about TDCJ employees' rights to legal counsel when being interviewed by officers about a criminal activity in accordance with his First Amendment Rights. Based on the documentation provided by Warden Cherry and his discussion with Mr. Fiesel, he decided to recommend that Mr. Fiesel be terminated.

Once Warden Willet affirmed the recommendation of dismissal, Mr. Fiesel appealed to the second level of the appeals process, to be heard by the Regional Director, Lepher Jenkins. Lepher Jenkins reviewed the documentation from Warden Willet and Warden Cherry and affirmed the termination after a brief discussion with Mr. Fiesel regarding the incident in the secretary's office. Jenkins admits that he was unaware at the time he reviewed the documents prepared by Warden Cherry's office that Mr. Fiesel had the warden's permission to attend the meeting, nor that Mr. Fiesel sat quietly through the meeting between the warden and Officer Bloodworth.

Mr. Fiesel never returned to work after the incident on January 7, 1998 and was formally terminated on February 13, 1998.

REASONS FOR GRANTING WRIT

This case squarely presents, on a short and well-defined record, an important issue that has been percolating in the Circuit Courts for the last several years: What types of speech constitute "a matter of public concern" for purposes of a retaliation claim under Section 1983 and the First Amendment? Every Circuit Court, has expressly weighed in on this threshold question. The result is four significantly different definitions, with the Fifth Circuit recently staking out, and applying in this case, a position far more restrictive than that taken by the other Circuits.

While the precedent case law is clear as to what the elements are for purposes of defining a matter of public concern, the application of the elements by each of the circuits is what is divergent. Guidance by this Court is sorely needed. This type of resolution is of the kind that this Court is empowered and arguably, obligated to perform.

The varying definitions of "a matter of public concern" have resulted in a string of irreconcilable outcomes in the Circuits. A record that invariably will lead to trial in many Circuits, in the Fifth Circuit almost certainly it will lead to grant of summary judgment. The Fifth Circuit has carved out its own restrictive standard in determining what constitutes "a matter of public concern." This conflicting state of the law is frustrating and inexplicable to litigants. It presents an equally perplexing problem for employees and employers – who need to know, and are entitled to know, what is and is not permissible speech under 42 U.S.C. 1983 and the First Amendment. This uncertainty is particularly troublesome because of the ever-increasing mobility of our nation's workforce and the increasing national scope of many businesses. As the law currently stands, as employees and employers move among the Circuits, the contours of their rights and obligations under First Amendment and Section 1983's protection against retaliation change as well. It is time to restore national uniformity.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A FOUR-WAY SPLIT AMONG THE CIRCUITS AS TO WHAT THE CIRCUIT COURTS ARE IN CONFLICT WITH WHAT CONSTITUTES "A MATTER OF PUBLIC CONCERN" UNDER A FIRST AMENDMENT RETALIATION CLAIM ANALYSIS SO AS TO PROMOTE UNIFORMITY.

Uniformity in the application of the standard for analyzing questions of Federal Law is essential to maintaining trust in the justice system. Currently there is a lack of uniformity among the circuits when it comes to applying the *Pickering* and *Connick* standards for determining when statements constitute a matter of public concern.

The Circuit Courts agree that under *Pickering* the Plaintiff must demonstrate that:

- the speech addressed a matter of public concern, and
- a First Amendment interest in that speech outweighed any injury that the speech might cause to the government's interest in promoting the efficiency of the public services it performs through its employees.

Pickering v. Board of Education of Township High School District, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (See E.G; *Mullin v. Town of Fairhaven*, 284 F.3d 31 (1st Cir. 2002); *Papas v. Giuliani*, 290 F.3d 143 (2nd Cir. 2002); *Baldassare v. State of N.J.*, 250 F.3d 188 (3rd Cir. 2001); *Hensley v. Horne*, 297 F.3d 344 (4th Cir. 2002); *Farmer v. Cleveland Public Power*, 295 F.3d 593 (6th Cir. 2002); *Wright v. Illinois Dep't of Children & Fam. Servs.*, 40 F.3d 1492, 1499-1500 (7th Cir.1994); *DeLlano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002); *Pool v. VanRheen*, 297 F.3d 899 (9th Cir. 2002); *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir.1994); *Chesser v. Sparks*, 248 F.3d 1117 (11th Cir. 2001); *Murray v. Gardner*, 741 F2d 434 at 439 (D.C. Cir. 1984))

The disagreement between the Circuits occurs in their application of determining when a Plaintiff's speech addresses a matter of public concern. The absence of an unambiguous definition of "a matter of public concern" and lack of direction on whether a personal aspect or private motive will remove speech from the scope of public concern forms the nucleus of the conflict. "Though the United States Supreme Court has not articulated a precise definition of public concern, it has stated that 'whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Pool v. VanRheen*, 297 F.3d 899 (9th Cir. 2002); citing *Connick v. Myers*, 461 U.S. 138, 147-148 (1983).

In *Connick*, this court attempted to resolve the Circuit Courts' misunderstanding by explaining that when an "employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick, supra*, 103 S.Ct. at 1690. However, the difficulty in interpreting *Connick* apparently created confusion and left unanswered questions among the Circuits. *Pool v. VanRheen*, 297 F.3d 899, f.n.4.(9th Cir. 2002) ("Although *Connick* provides for a limited type of First Amendment protection, it is difficult to apply this nebulous standard."); *O'Conner v. Steeves*, 994 F.2d 905, (1st Cir. 1993) ("The courts of appeals have adopted various approaches for determining whether a topic of employee speech is of 'public concern,' under the 'threshold inquiry' required by *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689.").

Out of this confusion has evolved four distinct interpretations of the Pickering-Connick standard, all of which offer conflicting rationale as to what constitutes a matter of public concern and whether a personal aspect or private motive will remove speech from the scope of public concern:

The four predominate interpretations of the *Connick* standard hold:

A. Speech that discloses governmental wrongdoing is generally a matter of public concern.

B. A personal aspect of private motive will not remove the speech from the scope of public concern.

C. Speech that is any way related to personal matters cannot be considered a matter of public concern.

D. Speech involving personnel disputes and grievances are not matters of public concern, but speech related to the operation of government will constitute a matter of public concern.

A. Speech That Discloses Governmental Wrongdoing Is Generally Matter Of Public Concern.

Many Circuit Courts have taken the view that speech on governmental wrongdoing is generally a matter of public concern irrespective of whether the speech contains a personal aspect or private motive. In effect, these courts have provided *per se* protection to public- employee speech on certain topics of "inherent" public interest, such as official malfeasance or abuse of office. *See Mullin v. Town of Fairhaven*, 284 F.3d 31 at 39 (1st Cir. 2002) (Personnel conflicts or disputes on internal procedures will not involve public concern, unless such speech articulates governmental wrongdoing.); *Papas v. Giuliani*, 290 F.3d 143 at 146 (2nd Cir. 2002) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."); *Baldassare v. State of N.J.*, 250 F.3d 188 (3rd

Cir. 2001) (The content of a public employee's speech may involve a matter of public concern, for purposes of a First Amendment retaliation action, if it attempts to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials.); *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir.1994) ("Whether public officials are operating the government ethically and legally is the quintessential issue of public concern."); *Chesser v. Sparks*, 248 F.3d 1117 (11th Cir. 2001) ("For purposes of determining whether government's alleged retaliation against employee for his speech violated the First Amendment, employee's speech addresses a 'matter of public concern' if it relates to any matter of political, social, or other concern to the community.").

B. A Personal Aspect Or Private Motive Will Not Remove The Speech From The Scope Of Public Concern.

Some Circuits have adopted a more liberal approach to the *Pickering-Connick* analysis. Here, the ideology is that a broader scope of free speech is necessary to safeguard the fundamental principles of a free and democratic society. Consequently, these Circuits have reasoned that a personal aspect or private motive will not remove speech from the scope of public concern in First Amendment retaliation cases. *Lickiss v. Drexler*, 141 F.3d 1220, 1222 (7th Cir.1998). *See Greer v. Amesque*, 212 F.3d 358 (7th Cir. 2000) ("A personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern, for purposes of determining whether the termination of a public employee for engaging in the speech violates the employee's First Amendment rights."); *Knapp v. Whitaker*, 757 F.2d 827, 840 (7th Cir.1985) ("The personal motive of the speaker will not remove the speech from the scope of public concern."); *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir. 1994) ("A personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern."); *Henley v. Horne*, 297 F.3d 344 (4th Cir. 2002)

(The personal motive of an employee who engaged in conversations regarding a coworker's claim that she had been sexually harassed on the job by employee's supervisor did not remove the speech from the area of public concern.).

C. Speech That Is In Any Way Related To Personal Matters Can Not Be Considered Of Public Concern.

Other Circuits, including the case at bar have adopted a far more stringent interpretation of "public concern." In these Circuits, if the speech is in any way related to personal matters, even if it address matters of governmental misconduct, such speech can not be considered a matter of public concern. *See, Farmer v. Cleveland Public Power*, 295 F.3d 593 (6th Cir. 2002) ("Speech that is of particular interest only to the speaker, unlike speech that touches on matters of public concern, cannot form the basis of a public employee's First Amendment retaliation lawsuit."); *DeLlano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002) (Speech of a personal nature contained in a letter complaining of governmental official's misconduct is deemed not to be a matter of public concern).

D. Speech Involving Personnel Disputes And Grievances Are Not Matters Of Public Concern, But Speech Which Relates To The Operation Of Government Will Constitute A Matter Of Public Concern.

Finally, the in the absence of an unambiguous definition of a matter of public concern under this Court's *Pickering-Connick* analysis, the District of Columbia Circuit has relied on the rational articulated by the Ninth Circuit. *Murray v. Gardner*, 741 F2d 434 at 439 (D.C. Cir. 1984) ("the role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontented employee do not.") Citing *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983) (Speech that is necessary or appropriate to enable citizens to make informed decisions about the operation of their government is of public concern, while

speech by public employees addressing individual personnel disputes and grievances is not.); Also see *Pool v. VanRheen*, 297 F.3d 899, 906 (9th Cir. 2002).

II. THE FOUR-WAY SPLIT IN THE CIRCUITS HAS RESULTED IN IRRECONCILABLE OUTCOMES IN CASES INVOLVING SIMILAR FACTS.

The four-way disagreement between the Circuits as to what constitutes "a matter of public concern" is more than an academic debate. The split is resulting in different outcomes in cases involving similar facts. This case is illustrative, but it must first be examined within the proper framework of the *Pickering-Connick* analysis.

State employees cannot be compelled to surrender the First Amendment rights they would otherwise enjoy as citizens to speak on matters of public interest in connection with the operation of the public entity in which they work. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Public employees are the members of a community most likely to have informed and definite opinions respecting the operation of the public entity for which they work. Id. at 572. For that reason, it is imperative that public employees be able to speak freely on such questions without fear of retaliatory dismissal. Id.

For public employee speech to be protected, it must be on a matter of public concern. Id. at 568, 572. Whether speech is on a matter of public concern is determined "by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-148 (1983). [1] The inquiry into the protected nature of speech is one of law, not fact. *Connick*, supra at 147-148 n.7. But

---

[1] This Court has defined "public concern" as referring "to any matter of political, social, or other concerns of the community." *Connick v. Myers*, supra, 461 U.S. at 146. See *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (quality of nursing care received by inmates in prison hospital, matter of public concern). See discussions of public concern in *Piver v. Pender Board of Education*, 835 F.2d 1076, 1078 (4th Cir. 1987) and in *O'Connor v. Steeves*, 994 F.2d 905, 913-915 (1st Cir. 1993).

what the content, context, and form of the speech in question *are* present issues of historical fact. *Rankin v. McPherson*, 483 U.S. 378, 385-386 ns. 8, 9 (1987); *Schwarzer, Summary Judgment Motions*, 139 F.R.D. 441, 455-456, 487 (1992). If it is determined the speech was protected, the Plaintiff must then prove as a factual matter that it was a motivating factor in the termination decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). See also *Village of Arlington Heights v. Metropolitan Housing District*, 429 U.S. 252, 264-65 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976). See also *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993).

Against this carefully illustrated backdrop for considering public employee free speech cases, Respondents' argument depicts a scenario in which Petitioner's constitutionally protected rights should be ignored merely because he spoke on behalf of a co-worker. The Court's analysis leads to the situation where potentially any public speech critical of institutional policy can be considered personal by mere virtue of the speaker's standing as part of the institution. This contravenes the purpose of the analysis set forth to determine the public nature of a given speech. The Fifth Circuit disregarded Mr. Fiesel's criticism of institutional misconduct merely because he was speaking on behalf of a co-worker. Mr. Fiesel's speech criticized institutional policy by specifically pointing to what he perceived to be governmental malfeasance. Mr. Fiesel's speech more clearly denotes policy rather than personnel criticisms. They represent an "impersonal attack on government operations" which is constitutionally protected. *Rosenblatt v. Baer*, 383 U.S. 75, 80 (1966).

The court of appeals held that the speech was not protected conduct under *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999), because Mr. Fiesel spoke primarily in his role as an employee addressing matters only of personal concern. The rationale was that since the speech was not protected speech, there could not have been no genuine issues of material fact in dispute as to whether he was terminated for engaging in protected conduct. The court thus applied Fifth Circuit opinion to Petitioner's speech

which engages in a cursory and ill applied analysis of the *Pickering-Connick* standard and defines a matter of public concern outside of the framework established by this Court. *Rankin v. McPherson*, 483 U.S. 378, 386 n.9.[2]

On summary judgment, the nonmoving party "must make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). However, as established in *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 156-157 (1970), and reaffirmed in *Celotex*, supra, 477 U.S. at 325, that showing can be made where the "sequence of events creates a substantial enough possibility that the nonmoving party can establish the essential element to allow the nonmoving party to proceed to trial...."

The *Adickes* principle clearly applies to this case. It contradicts the rationale and result reached by the court of appeals regarding the determination that there was no genuine issue of material fact in dispute. This approach permits a jury to infer from the circumstances that Defendants were motivated by Mr. Fiesel's protected speech to discharge him. *Adickes*, supra, 398 U.S. at 158. This is particularly true where motive is in issue because motive, similar to intent, "rarely can be decided on summary judgment." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982).

All inferences must be drawn in favor of the non-moving party, to the extent that if there appears to be some evidentiary support for the disputed allegations, the motion must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Here the summary judgment record is replete with evidentiary support for the fact that Mr. Fiesel spoke in his role as a citizen rather than as an employee addressing matters of personal concern. *Id.* Notwithstanding this important issue, it is paramount to Petitioner's argument that the issue itself was raised by the District Court, NOT by

---

[2] "in cases raising First Amendment issues the Court has repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression."

Defendants. The Appellate court committed error by adopting an argument injected into the motion by the District Court. *Craven v. University of Colorado Hosp. Authority*, 260 F.3d 1218 at 1226 (10th 2001). See *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir.1997); ("We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) (per curiam) ("Judges are not like pigs, hunting for truffles buried in briefs.").

As a consequence, the Appellate Court's rulings on the motion for summary judgment are patently flawed, defective and erroneous to the extent that they fail to engage in the proper summary judgment analysis proscribed by this Court.[3] In short, the Circuit Court committed clear error by making inferences on genuine issues of material fact against Mr. Fiesel, a nonmovant, by not applying the appropriate summary judgment standard, and by not taking into account evidence in the summary judgment record which clearly highlight genuine issues of material fact in dispute. *Anderson*, Supra 447 U.S. 242 at 247; *Adickes*, supra, 398 U.S. at 158; *Celotex*, supra, 477 U.S. at 325.

Had Mr. Fiesel engaged in the same type of speech in one of the Circuits that applied a different interpretation of public concern, the outcome would have been different. See *e.g.*, *Knapp* 757 F.2d 827, 840 (7th Cir.1985). Petitioner's speech would have been considered a matter of public concern and the court would have rationally denied the summary judgment motion. In *Henley, Supra*, 297 F.3d 344, a case strikingly similar to the case at bar, the Fourth Circuit ruled that the clearly private motive of the speaker did not remove the speech from the scope of public concern. In *Henley*, a public employee, addressed concerns that a co-worker had been sexually harassed on the job. *Id.* If the

---

[3] Summary judgment is proper only if there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law, which eliminates the necessity of a trial. *Crawford-El v. Britton*, 523 U.S. ___, 118 S. S.Ct. 1584, 1598 (1998).

analysis used by the Fourth Circuit in Henley were applied to Mr. Fiesel, the private nature of the speech would not have removed the speech from the realm of public concern. It logically follows that Mr. Fiesel would have avoided summary judgment in the Fourth Circuit.

It is undisputed that Mr. Fiesel voiced his concern on a matter that he perceived to constitute governmental wrongdoing. In Circuits that apply the per se analysis (speech on governmental wrongdoing is likely to automatically be considered a matter of public concern), the Appellate Courts would have considered his speech a matter of public concern and summary judgment would have been avoided. See *e.g.*, *Walter v. Morton*, 33 F.3d 1240, 1243 (10th Cir.1994) ("Whether public officials are operating the government ethically and legally is the quintessential issue of public concern."); *Baldassare v. State of N.J.*, 250 F.3d 188 (3rd Cir. 2001) (The content of a public employee's speech may involve a matter of public concern, for purposes of a First Amendment retaliation action, if it attempts to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials.).

This conflicting state of the law not only is frustrating to litigants, it creates confusion and uncertainty. In developing the *Pickering-Connick* analysis this court could not have intended for there to be a balkanized system of First Amendment rights, varying from one Circuit to the next. To the contrary, this Court has historically expressed the need for uniformity in the Circuit Court's application of the law. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743 (1998) ("a uniform and predictable standard...must be established as a matter of federal law.")

CONCLUSION

THEREFORE, Petitioner THOMAS FIESEL request of this Court that it GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED,

Trang Q. Tran
Counsel of Record
Tran Law Firm L.L.P
440 Louisiana Ste. 590
Houston, Texas 77002
(713) 223-8855
Attorneys for Petitioner

(Any footnotes trail end of each document)

No. 01-20142

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TOM FIESEL,
Plaintiff-Appellant,

VERSUS

DESSIE F. CHERRY, individually and in her official capacity as Senior Warden I, Texas Department of Criminal Justice; LEPHER JENKINS, individually and in his official capacity as Regional/Section Director, Texas Department of Criminal Justice; JAMES E. BUSH, in his official capacity as Director, Human Resources and Staff Development, Texas Department of Criminal Justice; CYNTHIA N. MILNE, in her official capacity as Legal Affairs, Texas Department of Criminal Justice; JANIE COCKRELL, in her official capacity as Deputy Director, Texas Department of Criminal Justice; GARY L. JOHNSON, Director; JAMES WILLET, individually and in his official capacity as Senior Warden, Texas Department of Criminal Justice,
Defendants-Appellees.

June 12, 2002, Decided

COUNSEL:
For TOM FIESEL, Plaintiff - Appellant: Trang Q Tran, Tran Law Firm, Houston, TX.
For DESSIE F CHERRY, LEPHER JENKINS, CYNTHIA N MILNE, JAMES WILLET, Defendants - Appellees: Sharon Felfe, Assistant Attorney General, Office of the Attorney General for the State of Texas, Austin, TX.

JUDGES:
Before DUHE, DeMOSS, and CLEMENT, Circuit Judges.

OPINION:

PER CURIAM:

Appellant, Tom Fiesel, brought suit against Dessie Cherry, Lepher Jenkins and James Willet, each employees and officials of the Texas Department of Criminal Justice ("TDCJ"), alleging that they used their positions to abridge his First Amendment right to freedom of speech, thereby rendering them culpable for violations of his civil rights, as recognized by *42 U.S.C. § 1983*. The defendants moved for summary dismissal of the suit pursuant to Fed. R. Civ. P. 56(c), contending that Fiesel's allegations failed to raise a genuine issue of material fact as to whether their conduct violated his civil rights and that they were entitled to qualified immunity. A magistrate judge recommended that the motion be denied. The district court declined to accept the magistrate judge's recommendation and granted the defendants' summary judgment motion. The district court held that, as a matter of law, Fiesel's speech did not involve a matter of public concern and that the defendants' were also entitled to qualified immunity. Fiesel now appeals. We affirm.

BACKGROUND

Tom Fiesel, a former corrections officer at the Goree Unit of the Texas Department of Criminal Justice-Institutional Division ("TDCJ"), brought a civil rights suit for retaliation in violation of his First Amendment rights against Dessie Cherry, the Senior Warden at the Goree Unit; Lepher Jenkins, a TDCJ Regional/Section Director; James Willet, another Senior Warden; James Bush, Director of Human Resources; Cynthia Milne, a TDCJ Legal Affairs official; Janie Cockrell, TDCJ Deputy Director; and Gary Johnson, TDCJ Director. Bush, Milne, Cockrell, and Johnson were dismissed and are not involved in the present appeal.

According to Fiesel, on the morning of January 7, 1998, Michael Bloodworth, another TDCJ corrections officer, asked Fiesel to accompany him to a meeting in Warden Cherry's office. Several days earlier, Bloodworth had been the reporting officer in an incident where an inmate was found in possession of marijuana. The inmate claimed that

Bloodworth had planted the marijuana on him, and the meeting with Cherry concerned the inmate's allegations and an investigation by the Internal Affairs Department ("IAD"). Prior to the meeting, Bloodworth had asked Cherry to allow Fiesel to be present for support as a non-participating observer. Fiesel agreed to attend the meeting with Bloodworth. After his shift ended at 6:00 a.m., Fiesel went home, changed out of his uniform, and returned to meet Bloodworth in Cherry's office.

Bloodworth and Fiesel met with Cherry and Major McGee. According to Fiesel, both Cherry and McGee questioned whether Bloodworth was lying about his involvement with the marijuana, and Cherry reportedly told Bloodworth that he would be questioned by IAD officers. During a break in the meeting, Bloodworth asked Fiesel what he thought Bloodworth should do, and Fiesel recommended that Bloodworth consult an attorney before being questioned further by IAD.

Bloodworth returned to Cherry's office while Fiesel remained outside in the hallway. Fiesel claimed that he heard Bloodworth state that he wanted an attorney before being interrogated and then someone said "no that he had to talk to them." Fiesel then stepped into the doorway and saw IAD officers Pittmon and Cole. Fiesel claims he stated that "TDCJ employees in [Bloodworth's] position are just like any U.S. citizen [and] has [sic] the right to an attorney before being questioned by police." Cherry, however, claims that Fiesel said to Bloodworth, "you're not under arrest, and, you don't have to talk to them." Pittmon, Cole, and Fiesel engaged in a somewhat heated colloquy, with all three raising their voices and asking to see each other's identification. According to Fiesel, Pittmon and Cole identified themselves as certified Texas peace officers and told him that he was criminally trespassing. Fiesel claimed that Pittmon then pushed him. Cherry and Bloodworth each testified that Cherry asked Fiesel to leave, repeating the request three times, but Fiesel claimed that he did not hear Cherry. Cherry called for security to come to her office, and Officer Pittmon escorted Fiesel to the front gate. The incident in Cherry's office lasted three to five minutes.

Cherry filed charges against Fiesel for violations of TDCJ Code 13, failure to obey a proper order, and Code 44, tampering with a witness, because Fiesel failed to obey her order to leave the office and told Bloodworth that he did not have to talk with IAD. Willet conducted a disciplinary hearing on the charges and recommended that Fiesel be terminated. Jenkins, as the level two hearing officer, concurred with the decision to terminate. The instant lawsuit followed.

The defendants filed a motion for summary judgment. The magistrate judge recommended denying the motion, reasoning that the content, context, and form of Fiesel's speech showed that his comments in Cherry's office were made solely as a citizen with respect to the availability of civil rights protections that he believed should have been afforded to Bloodworth. The magistrate judge determined that Fiesel's speech concerned his perception of misconduct on the part of the IAD officers, and, as such, the speech was a matter of public concern that, as a matter of law, outweighed the state's interest in efficiency. The magistrate judge further reasoned that there was an issue of fact as to whether Fiesel's speech was disruptive or undermined agency discipline, and also rejected the defendant's claim of qualified immunity because there were fact issues as to whether they acted reasonably.

The district court declined to accept the magistrate judge's recommendation and granted the defendants' summary judgment motion. The district court held that, as a matter of law, Fiesel's speech did not involve a matter of public concern, reasoning that Fiesel's statement that Bloodworth did not have to talk to IAD was "primarily a personal communication to a co-worker" and did not address TDCJ policy or law concerning an employee's right to counsel. Because Fiesel spoke as an employee on behalf of a co-worker rather than as a citizen on behalf of the public, the court held that Fiesel failed to show a constitutional violation.

The district court next determined that the defendants were entitled to qualified immunity because they acted objectively reasonably. The court reasoned that Cherry

ordered Fiesel to leave the office only when he exceeded the bounds of her permission to be present. Fiesel admitted that people began to talk all at once in raised voices, and, although Fiesel claimed he did not hear Cherry's order, there was no evidence that Cherry knew he did not hear her. The court also held that Fiesel failed to present evidence showing that Willet or Jenkins were objectively unreasonable in connection with his claim that they did not conduct independent investigations of the disciplinary charges. The court reasoned that the record showed Fiesel and his counsel participated in the disciplinary hearing and presented evidence to Willet, and they argued their position in an appeal hearing before Jenkins. Fiesel filed a timely Rule 59(e) motion, which the district court denied. Fiesel then filed a timely notice of appeal.

DISCUSSION

Standard of review

This Court reviews a district court's grant of summary judgment *de novo*. ***Topalian v. Ehrman***, *954 F.2d 1125, 1131 (5th Cir. 1992)*. Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmovant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." ***Amburgey v. Corhart Refractories Corp., Inc.***, *936 F.2d 805, 809 (5th Cir. 1991)*; FED. R. CIV. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the nonmoving party to produce evidence of the existence of a genuine issue for trial. ***Celotex Corp. v. Catrett***, *477 U.S. 317, 321-22, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The nonmovant cannot satisfy his summary judgment burden with conclusive allegations, unsubstantiated assertions, or only a scintilla of evidence. ***Little v. Liquid Air Corp.***, *37 F.3d 1069, 1075 (5th Cir. 1994)*(en banc).

Did the district court err by granting the motion for summary judgment because Fiesel's speech was not a matter of public concern as a matter of law?

A public employee may not be discharged, disciplined, or punished for exercising the right to free speech. ***Rankin v. McPherson***, *483 U.S. 378, 383, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987)*. A plaintiff making a First Amendment retaliation claim must establish four elements: 1) that he has suffered an adverse employment decision; 2) that his speech involved a matter of public concern; 3) that his interest in commenting on matters of public concern outweigh the defendant's interest in promoting efficiency; and 4) that the speech motivated the defendant's action. ***Harris v. Victoria Indep. Sch. Dist.***, *168 F.3d 216, 220 (5th Cir. 1999)*.

Whether speech involves a matter of public concern is "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)*. The employee must speak primarily in his role as a citizen rather than as an employee addressing matters only of personal concern. ***Harris***, *168 F.3d at 221*.

Fiesel argues that the district court erred in determining that his speech was not a matter of public concern. He contends that the district court improperly made a factual conclusion that his remarks were addressed only to Bloodworth rather than to the room as a whole. He also argues that the court improperly found Fiesel's speech concerned only personal matters when the defendants did not challenge the exact content of the speech or the identity of his audience. Fiesel argues that because he spoke about a perceived civil rights violation of another person and was off duty, in civilian clothes, he was speaking as a citizen. He argues that the content, context, and form of the speech shows that it was a matter of public concern.

We have reviewed the record and find that the district court did not err because Fiesel's speech was made solely on behalf of his co-worker, Bloodworth, and in the context of Bloodworth's encounter with IAD investigators. As Fiesel's

First Amendment retaliation claim is dependent upon establishing that his speech was a matter of public concern, and because he has failed to establish his speech as such, we need not review whether it was error to find that the appellees were entitled to qualified immunity.

CONCLUSION

Having carefully reviewed the record of this case and the parties' respective briefing and for the reasons set forth above, we conclude that the district court did not err in granting the appellees' motion for summary judgment. We therefore AFFIRM the district court's decision.

AFFIRMED.

Civil Action No. H-99-3549

UNITED STATES COURT DISTRICT COURT
FOR THE SOUTHER DISTRICT OF TEXAS
HOUSTON DIVISION

TOM FIESEL,
Plaintiff,

v.

DESSIE F. CHERRY, et al.,
Defendants.

Entered December 1, 2000

MEMORANDUM AND ORDER

By Order entered February 10, 2000 [Doc. # 16], the Court referred all dispositive matters in this First Amendment retaliation case to United States Magistrate Judge Calvin Botley pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Botley issued a Memorandum and Recommendation ("M&R") [Doc. # 38], which was entered on November 2, 2000. fn1 In his M&R, Magistrate Judge Botley recommended that the Motion for Summary Judgment filed by Defendants James Willet, Dessie Cherry, and Lepher Jenkins fn2 ("Motion") [Doe. # 26] be denied. Defendants filed objections to the M&R by the Court-imposed deadline of November 17, 2000. See Defendants' Objections to the Memorandum and Recommendation Dated November 2, 2000 ("Objections") [Doc. # 42]. Plaintiff's response to Defendants' Objections was due November 27, 2000. On the afternoon of November 28, 2000, Plaintiff requested and obtained an extension of the deadline for his response to 2:00 p.m. on November 29, 2000. Plaintiff filed his Response to Defendants' Objections to the Memorandum and Recommendation by the extended deadline. fn3

This Court has reviewed the M&R, Defendants' Objections, and Plaintiff' s Response to Defendants' Objections. The Court has also conducted a de novo review of the full record in this case, as well as the governing legal authorities. Based on this independent review, the Court declines to adopt the Magistrate Judge's M&R and instead issues this as the Court's Memorandum and Order. The Court concludes that Defendants are entitled to qualified immunity on Plaintiff's First Amendment claim, both because there was no First Amendment violation as a matter of law and because Defendants' conduct was not objectively unreasonable. As a result, the Court grants Defendants' Motion for the reasons set forth herein.

I. BACKGROUND

Although there are several factual disputes in this case, the material facts are uncontroverted. Plaintiff was employed by the Texas Department of Criminal Justice ("TDCJ") as a correctional officer at the Goree Unit. Defendant Cherry was the senior warden at the Goree Unit, Defendant Willet was the senior warden at TDCJ's Diagnostic Unit, and Defendant Jenkins was the regional director for the region which includes both the Goree Unit and the Diagnostic Unit.

In January 1998, the Internal Affairs Division ("IAD") sought to interview Plaintiff's co-worker Michael Bloodworth in connection with an investigation involving an inmate's possession of marijuana. Bloodworth asked Plaintiff to accompany him to the interview. On the morning of January 7, 1998, after their shift at the Goree Unit ended, Plaintiff and Bloodworth went to the warden's office at the Goree Unit for Bloodworth to meet with the TAD investigators. Before meeting with TAD, Bloodworth requested and received Warden Cherry's permission for Plaintiff to be present during the interview on Bloodworth's behalf as a non-participating observer. After meeting with the warden, but before meeting with the TAD investigators, Plaintiff and Bloodworth took a "restroom break" during which Bloodworth asked Plaintiff what he should do. Plaintiff advised Bloodworth to obtain

legal representation before talking to the TAD investigators.

At that point, Bloodworth went into Warden Cherry's secretary's office and Plaintiff remained outside in the hallway. Plaintiff heard Bloodworth tell the TAD investigators that he wanted an attorney. Plaintiff alleges that the TAD investigators directed Bloodworth to continue with the investigation and failed to acknowledge Bloodworth's request for an attorney. Plaintiff then decided to enter the office and participate in the discussion. Plaintiff stated that Bloodworth was free to leave and had a right to an attorney before being questioned by TAD investigators.

The discussion became more intense, with people speaking at the same time in raised voices. Warden Cherry ordered Plaintiff to leave the office, but Plaintiff claims that he did not hear the order. Plaintiff was again told by another officer that he needed to leave, and he left the office at the end of the conversation. The entire incident lasted between three to five minutes.

Warden Cherry charged Plaintiff with TDCJ rule violations based on his conduct on January 7, 1998, including his statement to Bloodworth that he did not have to speak with the TAD officers without an attorney present. Defendant Willet conducted the disciplinary hearing and recommended that Plaintiff be discharged. The decision to terminate Plaintiffs employment was approved by the "level two" hearing officer, Defendant Jenkins. Plaintiff was formally discharged on February 13, 1998.

Plaintiff filed this lawsuit, claiming that his discharge was in retaliation for his exercise of his rights under the First Amendment. Specifically, Plaintiff claims that he was discharged for having told Bloodworth that he was not required to speak with the TAD investigators without an attorney present. Defendants moved for summary judgment, and their Motion is now ripe for decision.

II. STANDARD FOR SUMMARY JUDGMENT

The United States Supreme Court has held that a motion for summary judgment is properly granted unless there is evidence "on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . .." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Wheeler v. Miller, 168 F.3d 241, 247 (5th Cir. 1 999). Rule 56 is an integral part of the Federal Rules of Civil Procedure, recognizing a party's right to demonstrate that certain claims have no factual basis and to have those unsupported claims disposed of prior to trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Once the movant shows that there are no genuine issues of material fact, the burden is on the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact warranting a trial. Texas Manufactured Housing Ass'n v. Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996), cert. denied, 521 U.S. 1112(1997). The nonmovant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. Doe v. Dallas Independent School Dist., 153 F.3d 211, 215 (5th Cir. 1998); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)(en banc).

"Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless." Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 192 (5th Cir. 1991). Rumors, speculation, hearsay and other information which would be excluded at trial cannot be considered in ruling on a motion for summary judgment. Fowler V. Smith, 68 F.3d 124, 126 (5th Cir. 1995).

III. QUALIFIED IMMUNITY ANALYSIS

A. Standard for Qualified Immunity

Officials sued in their individual capacities are protected by qualified immunity unless the act violates a constitutional right clearly established at the time. Sanchez v. Swyden, 139 F.3d 464 (5th Cir.), cert. denied, 525 U.S. 872 (1998). The plaintiff bears the burden of negating the defendant' s claim of qualified immunity. Foster v. City of Lake Jackson, 28 F.3d 425, 428 (5th Cir. 1994). To avoid summary judgment, a plaintiff must present evidence to raise a fact issue "material to the resolution of the questions whether the defendants acted in an objectively reasonable manner in view of the existing law and facts available to them." Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993) (emphasis added), cert. denied, 511 U.S. 1019 (1994).

A qualified immunity claim requires a two-part analysis. First, the Court must consider whether the plaintiff has alleged a violation of a "clearly established constitutional right." Siegert v. Gilley, 500 U.S. 226 (1991); Lampkin, 7 F.3d at 434. The right must have been so clear at the time of the act that a "reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1 987); Johnston v. City of Houston, 14 F.3d 1056, 1059 (5th Cir. 1994). Before a defendant will be denied the protection of qualified immunity, the plaintiff must show that a "reasonable actor must have known that the conduct violated a clearly-established right; not that, in some sense, he was doing something wrong." Foster, 28 F.3d at 430.

If the plaintiff alleges a violation of a clearly established constitutional right, the Court then considers whether the act complained of was "objectively reasonable." Hare v. City of Corinth, 135 F.3d 320, 327 (5th Cir. 1998); Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). The reasonableness of the act must be determined "with reference to the law as it existed at the time . . .." Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993). The individual defendant is entitled to

qualified immunity if reasonable public officials could differ on the lawfulness of his actions. Malley v. Briggs, 475 U.S. 335, 340 (1986); Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1 994). The subjective belief of the plaintiff as to the reasonableness of the official's actions is irrelevant to the qualified immunity issue. Pfannstiel v. City of Marion, 918 F.2d 1178, 1184 (5th Cir. 1990). Similarly, "even an officer who subjectively intends to act unreasonably is entitled to immunity if his actions are objectively reasonable." Id. at 1187. "[S]ubjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity . . . just as an officer's good intent is irrelevant when he contravenes settled law." Mendenhall v. Riser, 21 3 F.3d 226, 23 1 (5th Cir. 2000) (pet. for cert. filed Sept. 28, 2000).

B. Alleged Violation of Plaintiff's First Amendment Right

"An employee's First Amendment retaliation claim has four elements: (1) an adverse employment action; (2) speech involving a matter of public concern; (3) the employee's interest in speaking outweighs the employer's interest in efficiency; and (4) the speech must have precipitated the adverse employment action." Kennedy v. Tangipahoa Parish Library Board of Control, 224 F.3d 359, 366 (5th Cir. 2000). In this ease it is undisputed that Plaintiff suffered an adverse employment action and that his speech was a factor in the decision to terminate his employment.

Public Concern Element. – Plaintiff argues that his statement to Bloodworth that he was not required to talk with the TAD investigators unless he had an attorney present was a matter of public concern because the public "cares deeply about the [TDCJ's] ability to perform its basic function of staffing its prison at a safe level" and the "main reason that the [TDCJ] has trouble staffing its prison is because of the treatment and compensation of its prison guards." Plaintiffs Response to Defendants' Motion ("Response") [Doc. # 31], at 18. Whether Plaintiff's speech involved a matter of public concern is a question of law. See id.; Anderson v. Pasadena Independent School Dist., 184 F.3d 439, 444 (5th Cir. 1999).

Analysis of the "public concern" element of a First Amendment claim "takes into consideration the totality of the circumstances surrounding the speech at issue." Bradshaw v. Pittsburgh Independent School Dist., 207 F.3d 814, 816 (5th Cir. 2000). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole court record." Connick v. Myers, 461 U.S. 138, 147-48(1983); Kennedy, 224 F.3d at 366; Bradshaw, 207F.3d at 816-17. The Court concludes as a matter of law that the undisputed facts relevant to these factors establish that Plaintiff's speech in this case did not involve a matter of public concern.

Content. – Although Plaintiff is correct that the public is interested in TDCJ's ability to staff its facilities fully, Plaintiff's speech did not address that issue. The content of Plaintiff's speech was primarily a personal communication to a co-worker about Plaintiff's perception of the co-worker's right to an attorney during an TAD interview. Plaintiffs speech did not address expanding TDCJ policy or Texas law regarding an employee's right to counsel, but merely expressed Plaintiffs advice to a co-worker in connection with the coworker's personal dispute with the TAD investigators. "[R]eleasing the speech to the public would [not] inform the populace of more than the fact of [Bloodworth and Plaintiffs] employment grievance . . .." See Kennedy, 224 F.3d at 372.

Form. – The form of Plaintiffs speech also illustrates its personal, rather than public interest, nature. Plaintiff did not publicly express his concerns regarding a TDCJ employee's right to counsel during an TAD interview. Indeed, Plaintiff did not express his concerns in any form of official protest to TDCJ or other public officials. Instead, he only spoke to Bloodworth during Bloodworth's dispute with the TAD investigators.

Context. – Plaintiff s speech was in the context of Bloodworth' s encounter with TAD investigators. Plaintiffs speech was made during and in connection with

Bloodworth's personal employment dispute. There is no evidence that Plaintiffs statement to Bloodworth was made "against the backdrop of public debate" regarding legal representation of TDCJ employees during TAD interviews. See id. Instead, the statement was made only in furtherance of Plaintiffs perception of Bloodworth' s right to counsel during his personal employer-employee dispute.

Conclusion as to Public Concern Element. – Having considered the content, form, and context of Plaintiff s speech, the Court concludes that Plaintiff was not speaking on a matter of public concern. The content, form, and context of Plaintiffs statements show that the subject speech was an effort by Plaintiff to assist Bloodworth in his personal encounter with TAD investigators for Bloodworth's personal benefit, rather than a contribution to any public dialogue on the rights of TDCJ employees to counsel during TAD interviews. Plaintiff was speaking as an employee on behalf of a co-worker rather than as a citizen on behalf of the public. As a result, Plaintiff cannot as a matter of law establish that Defendants' conduct violated his constitutional rights.

C. Objective Reasonableness of Defendants' Conduct

Although Defendants are entitled to summary judgment based on Plaintiffs failure to establish a violation of his First Amendment rights, the Court will address the merits of the "objective reasonableness" prong of the qualified immunity defense to provide a more complete record. As stated above, Defendants are entitled to qualified immunity if reasonable public officials could differ on the lawfulness of their actions. Malley v. Briggs, 475 U.S. 335, 340 (1986); Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994). In this case, each of the three Defendants played a separate role in the decision to terminate Plaintiff's employment. As a result, the objective reasonableness of their actions must be considered separately. fn4

Defendant Cherry. – Defendant Cherry, senior warden at the Goree Unit, charged Plaintiff with the TDCJ disciplinary

offenses of failing to obey orders and tampering with a witness. Warden Cherry permitted Plaintiff to be present with Bloodworth as a non-participating observer on Bloodworth's behalf When Plaintiff exceeded the limits of Warden Cherry's permission and began to participate as an adviser to Bloodworth, Warden Cherry tolerated Plaintiff' s conduct initially. Plaintiff concedes that people then began to talk at once and voices were raised. It was only at that point that Warden Cherry determined that Plaintiff 's presence was disruptive and she directed Plaintiff to leave. Although Plaintiff now contends that he did not hear Warden Cherry's order to leave, there is no evidence in the record that Warden Cherry knew that her order had not been heard. As a result, it was not objectively unreasonable for Warden Cherry to believe, based on her own perceptions of the situation, that Plaintiff had violated TDCJ rules against disobeying orders and interfering with a witness.

Rather than present evidence which raises a genuine issue of material fact regarding the objective reasonableness of Defendant Cherry's decision to charge Plaintiff with the two rule violations, Plaintiff presents other options that Defendant Cherry had for handling the situation. Plaintiff's evidence that Cherry could have made other decisions does not raise a genuine issue of material fact regarding the objective reasonableness of the decision in fact made. Defendant Cherry is entitled to qualified immunity.

Defendants Willet and Jenkins. – Defendant Willet conducted the disciplinary hearing in connection with the charges against Plaintiff and recommended that Plaintiff be discharged. Defendant Jenkins reviewed Willet's recommendation that Plaintiffs employment be terminated and concurred in that recommendation. Plaintiff complains that these two Defendants failed to conduct an independent investigation of Defendant Cherry's charges.

The undisputed record establishes that Plaintiff and his attorney participated in the disciplinary hearing and presented evidence and arguments on Plaintiffs behalf before

Willet issued his recommendation. The undisputed record further establishes that Plaintiff was provided an appeal hearing before Defendant Jenkins in order to argue his position. Plaintiff has failed to present evidence which raises a genuine issue of material fact regarding the objective reasonableness of Defendant Willet's actions during the disciplinary hearing or of Willet's recommendation. Similarly, there is nothing objectively unreasonable about Jenkins's decision, as the reviewing official, to review the record and meet with the subject of the disciplinary matter rather than conduct a separate, independent investigation.

Defendants Willet and Jenkins are entitled to qualified immunity.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes as a matter of law that the speech on which Plaintiff bases his First Amendment claim was not a mailer of public concern. The Court also concludes that Plaintiff has not presented evidence which raises a genuine issue of material fact regarding whether Defendants' conduct was objectively unreasonable. As a result, Defendants are entitled to qualified immunity, and it is hereby

ORDERED that Defendants' Motion for Summary Judgment [Doc. # 26] is GRANTED. It is further

ORDERED that Plaintiff's Motion for Partial Dismissal [Doc. # 34] is GRANTED and Plaintiff's claim under 42 U.S.C. § 1985 is DISMISSED WITH PREJUDICE.

The Court will issue a separate Final Judgment.

SIGNED at Houston, Texas, this 30th day of November, 2000.

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Footnotes

fn1 Magistrate Judge Botley issued another Memorandum and Recommendation on October *25*, 2000 [Doc. # 36] recommending that the Court grant Plaintiff Tom Fiesel's motion to dismiss his claim under 42 U.S.C. § 1985. No objections were filed to the October *25*, 2000 Memorandum and Recommendation. Based on its *de novo* review, the Court concludes that the October *25*, 2000 Memorandum and Recommendation is correct. The Court adopts the October *25*, 2000 Memorandum and Recommendation as its own Memorandum and Order, and grants Plaintiff's request to dismiss voluntarily his § *1985* claim.

fn2 Defendants James Bush, Cynthia Milne, Janie Cockrell, and Gary Johnson were sued in their official capacities and were dismissed during a conference in open court on January 28, 2000. *See* Hearing Minutes and Order [Doc. # 14]. Defendants Willett, Cherry, and Jenkins, in their individual capacities, are the only remaining defendants.

fn3 Plaintiff also filed a Supplemental Response several hours later. The Court considered Plaintiffs arguments in this document despite its untimeliness.

fn4 Plaintiff argues that Defendants are not entitled to qualified immunity because they failed to "provide any proof" that they consciously considered Plaintiff's First Amendment rights when deciding whether to terminate his employment. Based on the information available to Defendants, however, it was not objectively unreasonable for them to conclude that Plaintiff's speech was not a matter of public concern and that its disruptive effect outweighed any First Amendment rights Plaintiff might enjoy under the circumstances.

Civil Action No. H-99-3549

UNITED STATES COURT DISTRICT COURT
FOR THE SOUTHER DISTRICT OF TEXAS
HOUSTON DIVISION

TOM FIESEL,
Plaintiff,

v.

DESSIE F. CHERRY, et al.,
Defendants.

Entered January 11, 2001

MEMORANDUM AND ORDER

By Memorandum and Order [Doc. # 50] and Final Judgment [Doc. # 51] entered December 1, 2000, the Court granted Defendants' Motion for Summary Judgment. The ease is now before the Court on Plaintiff Tom Fiesel's Rule 59 Motion for Reconsideration ("Motion") [Doc. # 52]. The Court has again reviewed the full record in this ease, including Plaintiff's Motion and the Court' s prior ruling. Based on this review and the application of governing legal authorities, the Court denies Plaintiff's Motion.

I. BACKGROUND

The factual and procedural background of this First Amendment employment dispute are set forth fully in the Court' s December 1 , 2000 Memorandum and Order, and they do not need to be repeated in detail herein. Briefly, Plaintiff was an employee of the Texas Department of Criminal Justice ("TDCJ"); Defendant Dessie Cherry was the senior warden at the Goree Unit where Plaintiff was employed; Defendant James Willet was the senior warden at TDCJ's Diagnostic Unit; and Defendant Lepher Jenkins was the regional director for the region that includes both the Goree

Unit and the Diagnostic Unit.

In January 1998, Plaintiff accompanied his co-worker, Michael Bloodworth, to an Internal Affairs Division ("IAD") interview at the Warden's office. Plaintiff advised Bloodworth to obtain legal representation before talking to the IAD investigators. When Plaintiff believed that the IAD investigators were questioning Bloodworth without acknowledging his request for an attorney, Plaintiff entered the Warden's office and stated to those present that Bloodworth was free to leave and had a right to an attorney before being questioned by IAD investigators. After a heated discussion among those present in the Warden's office, Plaintiff was told to leave and he ultimately did so.

Warden Cherry charged Plaintiff with TDCJ rule violations based on his conduct in January 1998, Defendant Willet conducted the disciplinary hearing and recommended that Plaintiff be discharged. Defendant Jenkins approved Defendant Willet's recommendation. Plaintiff was formally discharged on February 13, 1998.

Plaintiff flied this lawsuit, claiming that his discharge was in retaliation for his exercise of his rights under the First Amendment. Defendants' motion for summary judgment was granted and final judgment was entered on December 1, 2000.

II. STANDARD FOR RULE 59 MOTION

Initially, the Court notes that the Federal Rules of Civil Procedure do not provide for a "Motion for Reconsideration." See Hamilton Plaintiffs v. Williams Plaintiffs, 147 F.3d 367, 371 n.10 (5th Cir. 1998). Instead, a motion filed pursuant to Rule 59(e) is a Motion to Alter or Amend Judgment. Id.

"A motion to reconsider an order granting summary judgment is appropriate when the court is presented with newly-discovered evidence, when the court committed clear error, when there is an intervening change in controlling law, or when other highly unusual circumstances exist." Becerra v.

Asher, 92 1 F. Supp. 1 538, 1 548 (S.D. Tex. 1996), aff'd, 105 F.3d 1042 (5th Cir.), cert denied, 522 U.S. 824 (1997). "[N]either a Rule 59 nor a Rule 60 motion provides the proper vehicle for rehashing old arguments . . .." Resolution Trust Corp. V. Holmes, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994).

III. ANALYSIS

A. Whether Statements Involved Matter of Public Concern

Plaintiff's first contention in its Reconsideration Motion is that his comments involved a matter of public concern. This contention is without merit.

An essential element of an employee's First Amendment retaliation claim is that his speech involved a matter of public concern. See Kennedy v. Tangipahoa Parish Library Board of Control, 224 F.3d 359, 366 (5th Cir. 2000). Analysis of the "public concern" element of a First Amendment claim "takes into consideration the totality of the circumstances surrounding the speech at issue." Bradshaw v. Pittsburgh Independent School Dist., 207 F.3d 8 14, 816 (5th Cir. 2000). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole court record." Connick v. Myers, 461 U.S. 138, 147-48 (1983); Kennedy, 224 F.3d at 366; Bradshaw, 207 F.3d at 8 16-17. The Court has carefully reviewed the record and concludes that its prior decision on this legal issue was correct.

The uncontroverted evidence in the record establishes that the content of Plaintiff's speech was primarily a communication about Plaintiff's perception of his co-worker's right to an attorney during a specific TAD interview. As noted previously, Plaintiff's speech did not address expanding TDCJ policy or Texas law regarding an employee's right to counsel, but merely expressed Plaintiff's advice to a co-worker in connection with the co-worker's personal dispute with his employer. fn1

The uncontroverted evidence regarding the form of Plaintiff's speech also establishes the personal, rather than public interest, nature of that speech. Plaintiff did not express his concerns regarding counsel for a TDCJ employee either publicly or in any form of official protest to TDCJ or other public officials. Instead, he only spoke to those TDCJ employees present in the Warden's office during Bloodworth's interview.

Plaintiff' s speech was exclusively in the context of Bloodworth' s encounter with IAD investigators. Plaintiff's speech was made entirely during and in connection with Bloodworth's personal employment dispute. Plaintiff to date has not presented evidence that his statements during the IAD interview were made "against the backdrop of public debate" regarding legal representation of TDCJ employees during IAD interviews.

Plaintiffs argument in his Motion for Reconsideration regarding the public concern nature of his statements, previously made in opposition to Defendants' Motion for Summary Judgment, are not supported by the uncontroverted evidence in the record or by governing legal authorities. As a result, these arguments do not support his request for relief under Rule 59.

B. Objective Reasonableness of Defendants' Conduct

Plaintiff also seeks reconsideration of the Court's prior decision that Defendants were entitled to qualified immunity because their decisions were objectively reasonable under the circumstances. As he argued in opposition to Defendants' Motion for Summary Judgment, Plaintiff argues now that Defendants were "seasoned employees of the TDCJ system" and, therefore, knew that they were not permitted to violate an employee's rights under the First Amendment. See Motion, at 6. Plaintiff again argues that Defendants' "claim of qualified immunity [is] fatally flawed because they have failed to engage in the McBee-Pickering-Connic balancing tests before taking disciplinary action against Mr. Fiesel." Id. at 7.

The Court in its December 1, 2000 Memorandum and Order recognized and applied the proper standard for a qualified immunity defense in a First Amendment claim. Plaintiffs restatement of his prior arguments again fail to persuade the Court that there exists a fact dispute on the qualified immunity issue as to any Defendant. The uncontroverted evidence established that it was not objectively unreasonable for Defendant Cherry, senior warden at the Goree Unit, to believe, based on her own perceptions of the situation, that Plaintiff had violated TDCJ rules against disobeying orders and interfering with a witness. There is no evidence in the record, either as it existed at the time of Defendants' Motion for Summary Judgment or at this point, that Defendant Willet was objectively unreasonable in the manner in which he conducted Plaintiff's disciplinary hearing, or that Defendant Jenkins was objectively unreasonable in reaching his decision, as the reviewing official, to review the record and meet with the subject of the disciplinary matter rather than conduct a separate, independent investigation.

Plaintiff's argument regarding the "the MeBee-Pickering-Connic balancing tests" is without merit. There is no evidence in the record that Defendants, while aware that Plaintiff and all TDCJ employees enjoy rights under the First Amendment, believed that Plaintiff's speech at issue involved a matter of public concern which would invoke that First Amendment protection.

The Court correctly concluded that Defendants were entitled to qualified immunity, and Plaintiff is not entitled to relief under Rule 59(e) of the Federal Rules of Civil Procedure.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that its December 1, 2000 Memorandum and Order, and the corresponding Final Judgment, were correct and proper. Accordingly, it is hereby

ORDERED that Plaintiffs Rule 59 Motion for Reconsideration [Doc. # 52] is

DENIED.

SIGNED at Houston, Texas, this 10th day of January, 2001 .

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

Footnotes

fn1 Plaintiff's advice was arguably incorrect; nevertheless, the accuracy of his advice is not material.

FILED

SEP 6 2002

02 898 SEP 10 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

TOM FIESEL,

Petitioner,

v.

DESSIE F. CHERRY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

Trang Q. Tran
Counsel of Record
Tran Law Firm L.L.P
440 Louisiana Ste. 590
Houston, Texas 77002
(713) 223-8855
Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

14 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

DISTRICT COURT MEMORANDUM AND RECOMMENDATION (11/02/00) 25a

CIVIL ACTION NO. H-99-3549

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TOM FIESEL,
Plaintiff,

v.

JAMES WILLET, et. al.,
Defendants.

November 2, 2000 Filed

MEMORANDUM AND RECOMMENDATION

Defendants James Willett, Dessie F. Cherry and Lepher Jenkins (collectively referred to as "the Defendants"), each employees and officials of an agency of the State of Texas, the Texas Department of Criminal Justice ("TDCJ") seek, pursuant to Rule 56(c), Fed. R. Civ. P., the summary dismissal of Plaintiff Tom Fiesel's ("Fiesel") claims against them, contending that Fiesel's allegations fail to raise a genuine issue of material dispute as to whether their conduct violated his civil rights. See Defendants' Motion for Summary Judgment (Entry #25). Fiesel opposes their request for summary judgment and maintains that the Defendants used their positions to abridge his First Amendment right to freedom of speech, thereby rendering Defendants culpable for violations of his civil rights, as recognized by 42 U.S.C, § 1983;fn1 and, that summary judgment would be improper as there remain genuine disputes as to material facts raised by his allegations. See Plaintiffs Response to Motion for Summary Judgment (Entry #31).

FACTS

Fiesel's lawsuit, filed October 14, 1999, asserts that in

1998, he was a correctional officer with the TDCJ's Institutional Division. On January 1, 1998, a friend and co-worker, Michael Bloodworth ("Bloodworth"), asked him to attend a meeting, as a non-participating observer, scheduled that evening with his supervisor, Dessie F. Cherry ("Cherry"), a Senior Warden with TDCJ. Bloodworth related to Fiesel that he suspected the meeting would involve discussions related to charges that Bloodworth had engaged in a drug transaction with at least one TDCJ inmate. Fiesel, assured that his attendance was permitted by Cherry, consented to attend the meeting. That evening, after completing his job for the day, Fiesel met Bloodworth in Cherry's offices, where Cherry then advised Bloodworth that he was suspected of criminal activities and the Internal Affairs Division ("LAD") wished to question him, immediately. Cherry requested that Fiesel and Bloodworth step outside her office to allow the arrival of the IAD investigators. Fiesel and Cherry stepped into a hallway, an area just outside Cherry's secretary's office. Cherry's secretary's office was immediately adjacent to Cherry's office. While standing outside Cherry's office, and unaware that two IAD investigators were standing nearby, Fiesel and Bloodworth discussed Bloodworth's situation. Fiesel advised Bloodworth to consult an attorney, prior to submitting to an IAD interrogation. See Bloodworth deposition at Exhibit 11, attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32). Bloodworth then went into the secretary's office to indicate his desire to consult with an attorney prior to submitting to an IAD interrogation. Two individuals, standing just inside the secretary's office, then identified themselves to Bloodworth and Fiesel, as IAD investigators, Robert D. Pittman and Mark Cole, and advised Fiesel to cease interfering with their investigation. Fiesel told the officers that Bloodworth, as an employee, had the same rights as other United States citizens and had the right to [consult with] an attorney before being questioned by the police.fn2 Both Officers Pittman and Cole then advised Fiesel that he was trespassing. Defendants contend that Fiesel became hostile and angry and refused to show identification following a demand from the investigators. See Cherry Inter-Office Communication,

Exhibit 5 attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32). Fiesel maintains, however, that after being told to leave, he did so without altercation, and Investigator Pittman escorted Fiesel out of the building to the facility's front gate. Fiesel was charged with tampering with a witness (a Code 44 Level 1 violation) and failure to obey a proper order from an authority (a Code 13 Level 2 violation). See Fiesel Affidavit, Exhibit 6 of Plaintiffs Supplemental Exhibits (Entry #37); Exhibit 2, attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32). Fiesel never returned to his state position following the incident.

Thereafter, on February 13, 1998, Fiesel was terminated as a result of the Code 13 and 44 violations and upon the charges, recommendations and/or approval of Cherry, Lepher Jenkins, the Region I Director; James Willett, the Senior Warden; James Bush, Director, Human Resources and Staff Development; Janie Cockrell, Deputy Director; Cynthia Milne of Legal Affairs; and, Gary L. Johnson, the Executive Director. See Exhibits 5 and 7, attached to Plaintiffs Response to Motion for Summary Judgment (Entry #32); see also Exhibit D, attached to the exhibits (Entry #27) of Defendants' Motion for Summary Judgment. Fiesel contends that as he was at Cherry's office at the conclusion of his workday, that be was "on his own time," and was advising Bloodworth as a friend and citizen of the United States and not as an employee of TDCJ and that, accordingly, his firing was in retaliation for exercising his First Amendment constitutional right to freedom of speech in violation of 42 U.S,C. § 1983. Fiesel is seeking reinstatement to his position as a correctional officer, as well as monetary and injunctive relief.fn3

ANALYSIS

Motion for Summary Judgment

Summary judgment is proper only if there is no genuine dispute as to any material fact and the moving party is

entitled to judgment as a matter of law and, thereby, alleviates the necessity of a trial. See Crawford-El v. Britton, 523 U.S. —, 118 S.Ct. 1584, 1598 (1998); see also Fed. R. Civ. P. 56(c). A factual dispute is "genuine" when a reasonable jury could return a verdict for the nonmoving party. PYCA Industries, Inc. v. Harrison County Waste Water Management District, 177 F.3d 351, 361 (5th Cir. 1999); Crowe v. Henry, 115 F.3d 294, 296 (5th Cir. 1997). All inferences on summary judgment must be drawn in favor of the nonmoving party, to the extent that if there appears to be some evidentiary support for the disputed allegations, the motion must be denied. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247 (1986); McAllister v. R.T.C., 201 F.3d 570, 574 (5th Cir, 2000). Once the summary judgment motion is made and properly supported, however, the burden shifts from the movant to the adverse party, who may not rest on mere allegations or denials, but must set forth specific and supported material facts, of significant probative value, to preclude summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); International Association of Machinists and Aerospace Workers v. Compania Mexicana de Aviacion, S.A. de C. V., 199 F.3d 796, 798 (5th Cir. 2000); Union. Planters National Leasing, Inc. v. Woods, 687 F.2d 117, 119 (5th Cir. 1992).

DISCUSSION

1. The First Amendment Retaliation Claim

A State may not retaliate against an employee for exercising his First Amendment right to free speech. Rankin v. McPherson, 483 U.S. 378, 383 (1987); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d 814, 81.5 (5th. Cir. 2000); Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 444 (5th Cr. 1999). In order to successfully prosecute his First Amendment retaliation claim, Fiesel must establish that he suffered an adverse employment decision and that his speech motivated the defendants' alleged retaliatory conduct. Mt. Healthy Bd. of. Educ. v. Doyle, 429 U.S. 274 (1977): Bradshaw v. Pittsburg

Indep. Sch. Dist., 207 F.3d at 815; Gerhart v. Hayes, 217 F.3d 320, 321 (5th Cir. 2000); Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir. 1999). It should also be remembered, however, that First Amendment advocacy must give way to lawful governmental investigations, Brandenburg v. Ohio, 395 US, 444, 447 (1969); see also ACLU Foundation of Southern California v. Barr. 952 F.2d 457, 471 (9th Cir. 1991); and, generally, a public employee's right to free speech is limited when the exercise of free speech conflicts with the role of the public employee. Rankin v. McPherson, 483 U.S. at 383; Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d at 815. Accordingly, as a further threshold requirement to First Amendment constitutional protection, the public employee must establish that the speech in dispute addresses a matter of public concern and that the employee's interest in speaking outweighs the employer's interest in efficiency and discipline in the workplace. Connick v. Myers, 461 U.S. 138, 146-47 (1983); Kennedy v. Tangipahoa Parish Library, 224 F.3d 359, 366 (5th Cir. 2000); Teague v. City of Flower Mound, Texas, 179 F.3d 377,380(5th Cir. 1999). Otherwise, a court will not scrutinize whether the speech motivated a discharge from public employment. See Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F. 3d at 816; Click v. Copeland, 970 F.2d 106, 111 (5th Cir. 1992); Dodds v. Childers 933 F.2d 271 273 (5th Cir. 1991).

The determination as to whether the speech evoked by the public employee related to a matter of public concern, is a question of law to be resolved by the court. Rankin v. McPherson, 483 U.S. at 386 n.9; Bradshaw v. Pittsburg Indep. Sch. Dist., id; Tompkins v. Vickers, 26 F.3d 603, 606 (5th Cir. 1994). The analysis must consider the totality of the circumstances surrounding the speech at issue, to assess whether the individual spoke primarily as a citizen rather than as an employee of a public entity. Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d at 816; Thompson v. City of Starkville, 901 F.2d 456, 461 (5th Cir. 1990).

There is no dispute that the termination of Fiesel's employment with the State constituted an "alteration of

important conditions of employment" and, thereby, an adverse employment action contemplated by the First Amendment retaliation claim analysis. See Breaux v. City of Garland 205 F.3d 150, 157 (5th Cir. 2000); Pierce v. Texas Dept. of Criminal Justice, Institutional Div., 37 F.3d 1146, 1149 (5th Cir. 1994); Bickel v. Burkhart, 632 F.2d 1251, 1255 n.6 (5th cir. 1980). Nor, is there any argument with Fiesel's contention that it was his speech that precipated the termination of his state employment.fn4

Fiesel's assertions, made on behalf of Bloodworth, do not require the "mixed speech" analysis advanced by the decision in Connick v. Myers, 461 U.S. 138, 147 (1983); as there is no contention that any portion of Fiesel's statements were directed to acquire some personal employment benefit; and, it is clear that when evaluating Fiesel's statements in light of their content, form and context, that they were made solely as a citizen with respect to the availability of civil rights protections he felt were afforded another. See Kennedy v. Tangipahoa Parish Library, 224 F.3d at 366; see also Benningfield v. City of Houston, 157 F.3d 369, 375 (5th Cir. 1998), cert. denied U.S. 119 S.Ct. 1457 (1999).

The Defendants maintain, as a defense to the claim of First Amendment retaliation,, that they were justified in dismissing Fiesel, nonetheless, because Fiesel's statements impaired the efficiency and discipline necessary for the State agency to meet its governmental mission and objectives. See Defendant's Motion for Summary Judgment (Entry #26). Despite Fiesel's statements with respect to a matter of public concern, the speech may not merit constitutional protection if found to be outweighed by the State's interest as an employer, to promote the efficiency of the public services it performs through its employees. Rankin v. McPherson, 483 U.S. at 388; Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563, 568 (1968); Click v. Copeland, 970 F.2d at 111. It is the State's burden to establish, however, that its interest in maintaining efficiency and discipline in the workplace outweighs Fiesel's constitutional right to freedom of speech. Rankin v.

McPherson, 483 U.S. at 388; Connick v. Myers, 461 U.S. at 150. In this instance the Defendants failed to establish that Fiesel's statements, articulated while he was off-duty, in plain streetclothes rather than a work issued uniform, and made in the waiting area of a non-public office, constituted speech that was disruptive,, preclude the IAD investigation or, otherwise impaired the mission of the correctional agency. Defendants have failed to evince, without dispute, the manner in which Fiesel's statement; were calculated to be disruptive, were disruptive or served to undermine agency mission or discipline. In order to secure summary judgment as to the merits of Fiesel's First Amendment retaliation claim, Defendants must establish that there is no genuine issue as to any material facts as to their defense of impairment of efficiency and discipline. There is clearly genuine dispute as to whether Fiesel's statements were disruptive or undermined agency discipline. See Fiesel Affidavit Exhibit 6 of Plaintiff's Supplemental Exhibits (Entry #37); Robert Pittmon deposition, Exhibit J of Defendants' exhibits (Entry #27) to Motion for Summary Judgment. Furthermore, the disclosure of police misbehavior, i.e., the withholding of constitutionally secured rights in order to secure possible criminal prosecutions, is a matter of public concern that would outweigh the Defendants' interest in efficiency. See Breaux v. City of Garland, 205 F.3d at 157 n. 10; Teague v. City of Flower Mound, 179 F.3d at 381 (5th Cir. 1999); see also Kennedy v. Tangipahoa Parish Library, 224 F.3d at 373 n. 16.

The Defendants also contend that because the investigation of Bloodworth did not lead to a criminal prosecution and that they apprised Bloodworth of his rights under Garrityfn5 (an assurance that any self-incriminating statements would not be used against him in a criminal proceeding), that it was clear the investigation would not culminate in Bloodworth's criminal culpability and, therefore, Bloodworth had no right to an attorney. See Garrity Warnings and Assurances attached as Exhibit "I" to Defendants' exhibits (Entry #27) to Motion for Summary Judgment. There remains, however, a factual dispute as to whether at the time

Fiesel made his statements he was aware that Bloodworth had been given his Garrity warnings (see Plaintiff's Response to Motion for Summary Judgment (Entry #31) at para. 55-60; see also Fiesel's Affidavit at p. 5, attached as Exhibit 6 to Plaintiff's Supplemental Exhibit (Entry #37) and deposition testimony of Pittman at p. 98, identified as Plaintiffs Exhibit 10 (Entry #32), as Fiesel contends he, was unaware, at the time that he spoke, that Bloodworth had been given Garrity warnings and Officer Pittmon contends that Bloodworth had not been given Garrity warnings nor had a Garrity-type proceeding been explained to either Fiesel or Bloodworth, at the time Fiesel made his statements. Fiesel may have misconstrued the legal necessity for Bloodworth to have an attorney in attendance; however, it remains an issue to be resolved by a fact finder and Fiesel's mistake, if any, does not eliminate his constitutional right to advise another to seek legal advice before participating in what was believed by the speaker to be a criminal investigation. See Denton v. Morgan, 136 F.3d 1038, 1043 (5th Cir. 1998).

As Fiesel has established that he suffered an adverse employment decision and that his employment termination was motivated by the Defendants' conduct; and, the Defendants have failed to establish that Fiesel's speech, which should be found to be a matter of public concern, is outweighed by its interest in maintaining efficiency and discipline in the workplace, the Defendants' request for summary dismissal as to Fiesel's claim of First Amendment retaliation must be denied.

II. The Qualified Immunity Defense

The Defendants maintains that Fiesel's claims are barred by the affirmative defense of qualified immunity. The qualified immunity defense affords Defendants officials the necessary protection in their decision making processes from the claims of constitutional deprivations. Butz Economou, 438 U.S. 478, 503 (1978). Qualified immunity will shield an official performing discretionary functions from civil damages liability, provided his actions meet the test of

objective legal reasonableness, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); Piazza v. Mayne, 217 F.3d 239, 244 (5th Cir. 2000); Sorenson v. Ferrie, 134 F.3d 325, 327 (5th Cir. 1998).

A two-part inquiry is utilized to determine whether an official's alleged conduct meets the "objective legal reasonableness" test, by making a determination as to whether the plaintiff has alleged a violation of a clearly established constitutional right. Hanlon v. Berger, — U.S. slip op. at 2 (May 24, 1999); Siegert v. Gilley, 500 U.S. 226, 231-32(1991); White v. Balderama, 153 F.3d 237, 240 (5th Cir. 1998); Lampkin v. City of Nagodoches, 7 F.3d 430, 434 (5th Cir. 1993). "Clearly established," for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." U.S. v. Lanier, 520 U.S. 259, 270 (1997); Anderson v. Creighton, 483 U.S. 635, 639 (1987); Thomas v. City of Dallas, 175 F.3d 358, 364 (5th Cir. 1999). The second determination involves considering if the violation occurred, under the circumstances known to the defendants, could objectively reasonable officials believe that their conduct did not violate clearly established law. Crawford El v. Britton, — U.S. —' 118 S.Ct. 1584 at 1593-94; Wooley v. City of Baton Rouge, 206 F.3d 574, 580 (5th Cir. 2000); Baker v. Putnal, 75 F.3d 190, 198 (5th Cir. 1996). This is not to say that an official's action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law, the unlawfulness must be apparent. id. The objective reasonableness of the public officials' actions is a matter of law for the courts to determine; however, the underlying historical facts precipitating the alleged conduct are material to reasonableness and concededly, may be in dispute.fn6 Shipp v. McMahon, 199 F.3d 256(5th Cir. 2000); Mongieri v. Clifton, 29 F.3d 1012, 1015-16 (5th Cir. 1994).

Fiesel, in alleging a First Amendment retaliation claim, has asserted a violation of a clearly established constitutional right. Connick v. Myers, 461 U.S. at 150; Kennedy v. Tangipahoa Parish Library, 224 F.3d 359 at 377. Fiesel has,

therefore, successfully rebutted the first prong of the qualified immunity test. Moreover, Fiesel has presented a fact issue as to whether Defendants acted in an objectively reasonable manner in light of his clearly established rights. As has been discussed, the Defendants failed to establish that Fiesel's speech constituted a threat to its interest in the effective and efficient fulfillment of its responsibilities to the public and, in doing so, the Defendants concomittantly failed to show that it considered the effect of Fiesel's speech a threat to the agency's efficiency before implementing disciplinary action, the minimum required by the McBeefn7-Pickering-Connick balancing test. Rankin v. McPherson, 483 U.S. at 390; Kennedy v. Tangipahoa Parish Library 224 F.3d at 377; Click v. Copeland 970 F.3d at 112. Fiesel has met the second prong of the qualified immunity test, thus, defeating the Defendants' claim to summary judgment as to the defense. See Kennedy v. Tangipahoa Parish library, id; see also Click v. Copeland, 970 F.2d at 112.

Viewing the facts presented in the light most favorable to Fiesel, as the summary judgment analysis compels, he has alleged a violation of a clearly established right and also raised fact issues as to whether the Defendants acted in an objectively reasonable manner in light of the Plaintiff's dearly established rights. See Kennedy v. Tangipahoa Parish Library, 224 F.3d at 379. Defendants' request for summary judgment as to qualified immunity must, therefore, also be denied.

CONCLUSION

As there have been presented genuine issues as to material facts raised as to the issues of the merits of Plaintiffs First Amendment retaliation allegations and Defendants' claim of qualified immunity, it is

RECOMMENDED that Defendants' Motion for Summary Judgment (Entry #26) be DENIED.

The Clerk of Court shall file this Memorandum and Recommendation and provide the parties with a true copy.

The failure to file written objections to the proposed findings and recommendations within ten (10) days of the entry of this Memorandum and Recommendation, may bar an aggrieved party, except upon grounds of plain error, from attacking the proposed factual findings and legal conclusions, on appeal. See Acuna v. Brown & Root, Inc., 200 F.3d 335, 340(5th Cir. 2000); Douglas v. United Services Automobile Assoc., 79 F.3d 1415, 1424(5th Cir. 1996)(en banc); see also Crawford v. Falcon Drilling Co., Inc., 131 F.3d 1120, 1123-24(5th Cir. 1997).

SIGNED at Houston, Texas, on this the 1st day of November, 2000.

Calvin Botley
United States Magistrate Judge

Footnotes

fn1 Fiesel dismissed his 42 U.S.C. § 1985 claim. See Plaintiff's Motion to Voluntary Dismiss Claim (Entry #34).

fn2 There is a dispute as to whether in fact this was the statement made by Fiesel, as Cherry contends Fiesel merely stated Bloodworth was not under arrest and didn't have to stay. See Cherry deposition at Exhibit 8, p.66 attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32); see also Pittman deposition at p.59 of Exhibit I of exhibits (Entry #27) to Defendants' Motion h Summary Judgment. For purposes of summary judgment review, however, Defendants concede that Fiesel's speech consisted of the statements he alleges. See Defendants' Motion for Summary Judgment (Entry #26).

fn3 Additionally, Fiesel seeks reimbursement of attorneys' fees as allowed by 42 U.S.C. § 1988.

fn4 Additionally it is clear that the Defendants envisioned the manner in which Fiesel "tampered" with the witness (Bloodworth) was through his speech. More

importantly, the determination as to the employer's motivation requires a factual assessment prohibiting summary judgment review. See Click v. Copeland, 970 f.2d at 112.

fn5 See Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

fn6 See also, Lisa R. Eskow & Kevin W. Cole. The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness, 50 Baylor L. Rev. 869, 872-878 (1998).

fn7 McBee v. Jim Hogg County, Tex., 730 F.2d 1009 (5th Cir. 1984).